89- 1357

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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PETITION NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 TERM OF COURT

THOMAS W. HILL, Petitioner - Plaintiff,

v.

PAUL S. BRITT, Respondent - Defendant,

DEPARTMENT OF THE AIR FORCE, Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an interlocutory appeal may be taken out of time?

2. Whether a defendant, admittedly guilty of violating a plaintiff's fourth amendment rights in matters outside the scope of "personnel actions", is no longer subject to a qualified immunity test as stated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), but is rather absolutely immune from suit whenever a prior federal employment relationship has existed?

LIST OF PARTIES

In addition to the parties listed in the caption, Paul J. Vallerie and the Merit System Protection Board are parties in the District Court action.

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9 J. Moore, B. Ward, J. Lucas,
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15 C. Wright, A. Miller, E. Cooper,
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REFERENCE TO REPORTS

Order and Judgment, Appeal No. 88-2775, Tenth Circuit, reh'g denied. Appendix, pp. 34, 46.

Order (denying motion to dismiss appeal), Appeal No. 88-2775, Tenth Circuit, Appendix, p. 49.

U.S. District Court (D.N.M.) Findings of Fact, Dkt. No. 295, Civil No. 85-1485 JB. Appendix, p. 1.

U.S. District Court (D.N.M.) Memorandum Opinion and Order (Re: Constitutional Claims), Dkt. No. 477 , Civil No. 85-1485 JB. Appendix, p. 15.

GROUNDS FOR JURISDICTION

The Order and Judgment for which review is sought is dated July 7, 1989. Plaintiff's Petition For Rehearing was denied by Order dated October 6, 1988.

Plaintiff believes that 28 U.S.C. Section 1254 confers upon the Supreme Court jurisdiction to review the Tenth Circuit Judgment in question.

INVOLVED PROVISIONS

U.S. Constitution. This case involves provisions of the Fourth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is a matter wherein the Petitioner's fourth amendment constitutional rights were admittedly and repeatedly violated by a former supervisor bent on reprisal for Petitioner's having blown the whistle on the supervisor's misconduct and having sued agency U.S. Air Force under provisions of the Privacy Act and the FOIA. The Court found Respondent's actions to be "something other than 'personnel actions' within the purview of any statutory scheme". Appendix, p. 26.

1. Amended complaint was filed 29 November 1985, stating inter alia a Bivens cause against Respondent. The D.N.M. District Court conducted a hearing in June 1986 and entered its findings of fact (Appendix p. 1), concluding that Petitioner was a victim of reprisal and

that his constitutional rights had been violated by Respondent and others. Evidence before the Court showed that Petitioner had been subjected to numerous invasions of privacy, including eavesdropping by a number of persons on his private conversations and spying on his out-of-duty actions. Bruno J. Manz, Petitioner's first level supervisor, affirmed spending about half of his time during the said period monitoring Petitioner's activities, including eavesdropping on Petitioner's personal discussions involving marital and other private matters. He further testified that he and others had done so in response to Respondent Britt's directives. Although Britt had absolutely no responsibility for such investigations, he admitted that he had directed the spy activities. The District Court further found that Peti-

tioner had been singled out for disparate treatment with a stated intent to "get" him. Appendix, pp. 4, 6.

2. By Initial Pre-Trial Order entered on 25 April 1986 (Dkt. No. 148) and signed by both parties, the District Court directed that all dismissal motions be filed no later than 30 September 1986,

> "Pre-trial motions, other than discovery motions, shall be filed on or before September 30, 1986; any pre-trial motions other than discovery motions, filed after the above date shall be considered untimely in the discretion of the Court ...
>
> APPROVED WITHOUT EXCEPTIONS
>
> [signature] Rhonda P. Backinoff
> For Defendant."

On that date Respondent filed an alternative motion to dismiss.

3. On 21 September 1987 the District Court denied the motion as to the constitutional claims against Respondent. Appendix, p. 15. In an exhaustive dis-

cussion the Court explained its reasoning and noted that Plaintiff's removal from federal service had been sustained by the Merit Systems Protection Board, but further noted that fourth amendment allegations had not, and could not be adjudicated by the Board, citing Bush v. Lucas, 462 U.S. 367 (1983) and Katz v. U.S., 389 U.S. 347 (1967).

4. During the ensuing seven month period Respondent took no further action regarding denial of his motion. Then, on 29 June 1988 (Dkt. No. 531), i.e., more than a year late, he submitted a supplement without leave of the Court, attempting to argue qualified immunity. The Court took no further action on the case until then pending appeals had run their course, and summarily denied the untimely motion on 14 October 1988.

5. Respondent noticed appeal on 9

November 1988. He based his appeal on the belated claim of qualified immunity, arguing that he had timely raised the said issue, and that the District Court had failed to rule on the matter. However, his 30 September 1986 motion to dismiss presents no showing of entitlement to qualified immunity. Neither did his Answer claim qualified immunity.

6. The Tenth Circuit granted review (Appendix, p. 49), denying Petitioner's motion to dismiss for lack of jurisdiction, which specifically noted untimeliness and cited the District Court Pre-Trial Report. In its Order the Appellate Court did not discuss these issues, but did state,

> "We note, however, that the record remains unclear regarding the parameters of this appeal. On September 21, 1987, the district court denied in part defendant's motion to dismiss without addressing the issue of defendant's qualified

> immunity. Defendant moved to supplement the motion to dismiss to further discuss the qualified immunity issue. Without elaboration, the district court denied the motion to supplement on October 14, 1988. On the state of the record, the appeal may not decide the qualified immunity issue ..."

7. The Court of Appeals subsequently refused to address the qualified immunity issue, instead granting all of the relief sought by Respondent on the basis of its holding that the nature of the constitutional tort is immaterial whenever a federal employment relationship has existed between the parties, and that such relationship forecloses a Bivens remedy. Appendix, p. 43. The Circuit Court implicitly revoked the holdings of its previous jurisdiction Order (para. 6 above), and further suspended the provisions of its own rules in order to afford separate relief sought by Respondent regarding recordation of a no-

tice of lis pendens. Appeal No. 88-2917. The action marked the third instance of interlocutory intervention by the Tenth Circuit in the instant proceeding in favor of the Defendants, and Defendants have since chided the District Court to get on with its rulings so that they may proceed with another appeal.

REASONS FOR ALLOWANCE OF THE WRIT

I. There Is Disagreement Among The Circuit Courts As To Whether An Interlocutory Appeal Of Qualified Immunity May Be Taken Out Of Time.

1. In a thorough review of this very issue within the context of qualified immunity the Fifth Circuit held, Kenyatta v. Moore, 744 F.2d 1179 (1984), cert. denied, 105 S.Ct. 2141 (1985),

"The [defendants'] first motion for summary judgment in December, 1978, asserted that they were absolutely immune from the plaintiff's state-law causes of action. The district court denied the motion in its order of December 21, 1979. They did not appeal that decision. ...

[Defendants] contend that they are now entitled to appeal the 1979 denial of their absolute immunity defense. They contend that interlocutory appeals are permissive and are not subject to the time limit set on appeals of right in Fed.R.App.P. 4. The conclusion is simply mistaken. 'The procedure for taking an appeal from an interlocutory order that is appealable as of right is precisely the same as that for taking an appeal from a final judgment. The appeal must be taken in the time provided by Rule 4 of the Federal Rules of Appellate Procedure. An interlocutory appeal need not be taken merely because it is authorized, but if it is authorized, it must be timely taken or the right to take it will be lost ...' 9 J. Moore, B. Ward, J. Lucas, Moore's Federal Practice Para. 110.21 2 (footnotes omitted).[29] ...

The fact that the defendants nominally reiterated their state-law absolute immunity

> defense in their second motion for summary judgment, which was never in fact ruled on by the court ... does not thereby give them a second opportunity to appeal. ... [Emphases added.]
>
> ---
>
> [29] ... See also 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure Section 3911 at 498."

2. The holdings of the Kenyatta case are directly applicable to circumstances herein. Respondent did not timely appeal the 21 September 1987 denial of his motion to dismiss, but rather waited until 29 June 1988 to "supplement" his previously denied motion. Under the circumstances he is stuck with Hobson's choice. If he did not timely raise the defense, he waived it under the local District Court Rules. See para. 3. below. Assuming arguendo that he did raise the same, his appeal was due sixty days after denial of his

motion to dismiss (with exceptions and extensions as provided in FRAP Rule 4, none of which apply herein).

3. According to the provisions of the Rules of the U.S. District Court for the District of New Mexico, Respondent has waived qualified immunity defense. At Rule 5.c., Id.,

> "If an answer or other pleading raises or contains any of the seven enumerated defenses provided in Rule 12(b) of the Federal Rules of Civil Procedure, the party filing such pleading shall request in writing that such portion of the answer or other pleading be treated as a motion filed under Rule 9 of these rules. Should a party fail to make such written request, such a defense may be treated as having been waived, except for jurisdictional motions."

At Rule 9.c., Id.,

> "Opposed Motions. Counsel shall submit with all opposed motions a brief or supporting points with citations or authorities. Where allegations of fact are relied upon, affidavits in support shall be attached."

In his Answer (Dkt. No. 38) Respondent did not claim qualified immunity, but did recognize the importance of the Rule 5 requirements and promised to file some non-specific pleading to satisfy them at a later date. He never did so.

4. By motion to dismiss Petitioner pointed out these facts to the Tenth Circuit; however, the Circuit Court denied his motion without mentioning the timeliness issue. The Circuit Court has effectively held that the District Court can not enforce its own deadlines and other rules, and that provisions of Rule 4 of the Federal Rules of Appellate Procedure do not apply whenever a defendant belatedly moves to dismiss under a claim of qualified immunity. The failure to timely appeal is "mandatory and jurisdictional", United States v. Robinson, 361 U.S. 220, 224 (1960), and the Tenth Circuit's

willingness to waive the requirement for the Department of Justice opposes Congressional intent to strictly limit Appellate Court interference during the trial court proceeding. In fact, Circuit Court interventions in the instant action have made shambles of the District Court proceeding. Not only has the Tenth Circuit granted every detail of relief sought by the Defendants, including Defendants' request that it suspend provisions of its own rules to afford summary relief (Appeal No. 88-2917), but it also directed the Respondent to pressure the District Court for reconsideration after appeal had been taken. Tenth Circuit Order, Appendix, p. 51,

> "[D]efendant is directed to seek clarification of the status of the qualified immunity issue in the district court ... perhaps the district court will expedite its consideration and disposition of the issue."

II. The 10th Circuit Has Misinterpreted Bivens and Schweiker v. Chilicky In The Decision Under Review. Its Holding Is At Variance With Bivens And Overrules The Test Fashioned By The Supreme Court In Harlow v. Fitzgerald.

1. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court provided a qualified or "good faith" immunity test for officials of the Executive Branch other than the President and his advisors. In order to claim such defense an official must demonstrate that he did not knowingly violate the law or that a reasonable person would not have known that the actions of which he is accused were so violative. The Respondent herein cannot maintain either claim. The District Court found that he had boasted of his intent to harm the Peti-

tioner and that he had coordinated his actions with agency attorneys. Further, the dates of Katz v. United States, 389 S.Ct. 347 (1967), United States v. United States District Court, 407 U.S. 297 (1972) (Keith), and Mitchell v. Forsyth, 472 U.S. 511 (1985) preclude claims of unawareness by a reasonable person.

2. Schweiker v. Chilicky, 108 S.Ct. 2460 (1988), does not support the proposition that the Supreme Court has abandoned the standard of qualified immunity for federal officials accused of constitutional deprivations external to the scope of their official duties. The gravamen of the Chilicky case was action which was within the scope of Schweiker's official duties. Moreover, the two personnel cases summarily returned to the Appellate Courts for reconsideration following the Chilicky decision both

involved clearly-defined personnel actions, which were within the scope of the official duties of the defendants. By contrast, the District Court has found the instant Respondent's actions to be "something other than personnel actions", and the Tenth Circuit has admitted that "Hill's allegation of violation of his right to privacy by Britt's eavesdropping on his personal telephone conversations is not an allegation of a violation of a listed prohibited personnel practice". The Tenth Circuit's determination that Petitioner may not pursue a Bivens cause against Respondent is directly contravened by Bush v. Lucas, 462 U.S. 367, 385 n.28 (1983),

> "[C]ertain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme."

At 391, Id., Marshall, J., concurring,

> "Moreover, there is nothing in today's decision to foreclose a federal employee from pursuing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme."

3. Application of O'Connor v. Ortega, 107 S.Ct. 1492 (1987) to the circumstances herein is dispositive to all issues. O'Connor, the executive director of Napa State Hospital, was a supervisor of plaintiff Ortega, a physician who accused O'Connor of violating his constitutional rights of privacy. The Court did not release O'Connor under a claim of immunity accruing from an employment relationship, but instead held (Id., 1504),

> "[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by a standard of reasonableness under all circumstanc-

> es. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. ... On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope."

There is no distinction between Section 1983 actions against state officials, as in O'Connor, and Bivens actions against federal officials. Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 2909, (1978),

> "[W]e deem it untenable to draw a distinction for the purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the Constitution against federal officials."

CONCLUSION

Petitioner believes that the instant Tenth Circuit Judgment should be summarily reversed for lack of Appellate

Court jurisdiction of the subject matter, permitting District Court trial to proceed. In the alternative, Petitioner seeks reversal on the merit. If the Supreme Court is of the opinion that oral argument should be provided only by a practicing attorney, Petitioner shall comply with such indication.

Respectfully submitted,

Thomas W. Hill
Petitioner